Lightweight Concrete Sdn Bhd v Nirwana Indah Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-122 OF 1996
KAMALANATHAN RATNAM J
27 JANUARY 1999

Contract *— Building contract — Delay — Defendant counterclaimed for penalty for late completion of installation — Late completion was occasioned by neglect of defendant to secure sufficient and timely supply of granite to plaintiff — Whether counterclaim should be rejected*

Contract *— Building contract — Lump sum contract — Whether lump sum contract is a collateral contract — Whether plaintiff entitled to base its claim for bonus on terms of the lump sum contract*

The defendant was the developer of a project. By a sub-contract agreement, the plaintiff was appointed as the sub-contractor for the design, manufacture, supply, delivery and installation of the pre-finished pre-cast concrete panels with granite slabs affixed thereon, for the project. A revised lump sum sub-contract agreement was then signed by the plaintiff and the defendant ('the agreement') containing terms, inter alia: (i) the defendant shall pay a lump sum bonus of RM250,000 if the plaintiff complete the installation works of the pre-cast panels up to and inclusive of level 31 on or before 31 August 1992 and that if the plaintiff failed to do so, the defendant shall impose a penalty of RM10,000 per day; and (ii) in the event of the plaintiff's failure to complete the works from and above level 31 up to the top of building on 30 September 1992, the defendant shall impose a penalty of RM10,000 per day. The plaintiff contended that it had completed the installation works up to level 31 by 31 August 1992 and thus claimed against the defendant the sums of RM250,000. The defendant argued that the agreement is a collateral contract and since the pertinent and relevant clauses of the main contract had not been incorporated into the agreement, the latter could not be relied upon to form the basis of a claim. The defendant further argued that the works were only completed on 1 September 1992 and counterclaimed for a day's penalty of RM10,000. The defendant also counterclaimed, inter alia, for late completion of installation above level 31 for 171 days. The plaintiff admitted that it only completed the works on 20 March 1993, but contended that the delay was caused by the neglect of the defendant in failing to secure sufficient and timely supply of granite to the plaintiff. Evidence was adduced that there was a letter appointing Tan Chiang Brothers as the granite supplier and a letter from the architect to the defendant that the delay in the supply of the granite was due to the supplier.

Held, allowing the plaintiff's claim and dismissing the defendant's counterclaim:

(1) The plaintiff was entitled to base its claim on the lump sum agreement. The entire evidence was premised on the issue as to whether the works were completed by 31 August 1992, so as to determine the plaintiff's entitlement to the bonus under the terms of the agreement. In fact, the whole of the counterclaim was premised on claims based on late completion as stated in the agreement. This was a clear case of the defendant approbating and reprobating. Therefore, the court rejected the defence's contention that the agreement amounted to a collateral contract. There was no evidence to support such a stand. Besides, this was never pleaded (see p 357B–D).

(2) Having reviewed all the evidence, the court was satisfied that the installation of the panels up to level 31 was indeed completed by 31 August 1992. In the circumstances, judgment was entered for the plaintiff for the bonus sum of RM250,000 with interest (see p 357E–F).

(3) The supply by the plaintiff was only limited to completed panels and slabs and not to the supply of raw granite. The evidence showed that the defendant was dealing directly with Tan Chiang Brothers for the supply of granite and that the supplier was under the control of the defendant. Thus, the plaintiff could not be held responsible for the delay caused by the supplier of the granite (see p 358C–G).

[Bahasa Malaysia summary

Defendan merupakan pemaju suatu projek. Melalui suatu perjanjian sub-kontrak, plaintif telah dilantik sebagai sub-kontraktor untuk rekacipta, perkilangan, pembekalan, penghantaran dan pemasangan panel konkrit pratuang siap dengan bidur granit yang dilekatkan padanya, untuk projek tersebut. Suatu perjanjian jumlah sekaligus sub-kontrak yang disemak semula kemudiannya ditandatangani oleh plaintif dan defendan ('perjanjian tersebut') yang mengandungi terma, antara lain: (i) defendan haruslah membayar bonus jumlah sekaligus sebanyak RM250,000 sekiranya plaintif menyiapkan kerja-kerja pemasangan panel pratuang hingga dan termasuk tingkat 31 pada atau sebelum 31 Ogos 1992 dan bahawa sekiranya plaintif gagal berbuat demikian, defendan akan mengenakan denda penalti sebanyak RM10,000 sehari; dan (ii) sekiranya plaintif gagal untuk menyiapkan kerja dari dan atas tingkat 31 sampai kemuncak bangunan pada 30 September 1992, defendan akan mengenakan penalti RM10,000 sehari. Plaintif berhujah bahawa ia telah menyiapkan kerja-kerja pemasangan hingga tingkat 31 pada 31 Ogos 1992 dan dengan itu menuntut jumlah sebanyak RM250,000 daripada defendan. Defendan berhujah bahawa perjanjian tersebut merupakan kontrak kolateral dan oleh kerana fasal-fasal kontrak utama yang penting dan relevan tidak digabungkan dalam perjanjian tersebut, kontrak utama tidak boleh digunakan sebagai asas suatu tuntutan. Defendan seterusnya berhujah bahawa kerja-kerja tersebut

A hanya disiapkan pada 1 September 1992 dan menuntut balas untuk penalti sehari sebanyak RM10,000. Defendan juga menuntut balas, antara lain, untuk persiapan lewat pemasangan atas tingkat 31 selama 171 hari. Plaintif mengakui bahawa ia hanya menyiapkan kerja-kerja tersebut pada 20 Mac 1993, tetapi menghujahkan bahawa kelewatan disebabkan oleh keabaian defendan dalam kegagalan untuk menjamin B pembekalan granit yang mencukupi dan menepati masa kepada plaintif. Keterangan telah dikemukakan bahawa terdapat sepucuk surat yang melantik Tan Chiang Brothers sebagai pembekal granit dan sepucuk surat daripada arkitek kepada defendan bahawa kelewatan dalam pembekalan granit tersebut adalah disebabkan oleh C pembekal.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan:

(1) Plaintif berhak mendasarkan tuntutannya atas perjanjian jumlah D sekaligus. Keseluruhan keterangan adalah berdasarkan isu mengenai sama ada kerja-kerja tersebut siap pada 31 Ogos 1992, bagi menentukan hak plaintif mendapat bonus di bawah terma perjanjian tersebut. Pada hakikatnya, keseluruhan tuntutan balas adalah berasaskan tuntutan yang bersandar pada persiapan lewat seperti yang dinyatakan dalam perjanjian tersebut. Ini merupakan E suatu kes jelas di mana defendan mengambil apa faedah yang memihaknya tetapi menolak bahagian yang tidak. Maka, mahkamah menolak penghujahan pembelaan bahawa perjanjian tersebut merupakan kontrak kolateral. Tidak terdapat keterangan untuk menyokong pendapat sedemikian. Di samping itu, ini tidak pernah diplidkan (lihat ms 357B–D).

F

(2) Setelah mengkaji segala keterangan, mahkamah puas hati bahawa pemasangan panel sehingga tingkat 31 memang siap pada 31 Ogos 1992. Dalam keadaan begitu, penghakiman dimasukkan untuk plaintif bagi jumlah bonus sebanyak RM250,000 dengan faedah (lihat ms 357E–F).

G

(3) Bekalan oleh plaintif hanya terhad kepada panel serta bidur yang siap dan bukannya kepada pembekalan granit mentah. Keterangan menunjukkan bahawa defendan berurusan secara langsung dengan Tan Chiang Brothers untuk pembekalan granit dan bahawa pembekal berada di bawah kawalan defendan. H Justeru itu, plaintif tidak boleh dipertanggungjawabkan atas kelewatan yang disebabkan oleh pembekal granit (lihat ms 358C–G).]

Notes

I

For cases on delay in building contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1286–1289.

For cases on lump sum contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1300–1301.

Case referred to

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 (folld)

David Morais (*Sunita Nathan* with him) (*M David Morais*) for the plaintiff.

KL Chew (*Chew & Lim*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff is a specialist contractor for the design, manufacturing and installation of pre-cast concrete panels. These panels are used on the external walls of buildings. The term 'pre-cast' is used to indicate that the panels are manufactured at the factory or off-site. The defendant is the developer of a project known as Plaza Goldhill situated at Jalan Raja Chulan, Kuala Lumpur ('the project'). By a letter dated 13 May 1991, the defendant accepted the plaintiff's tender as sub-contractor for the design, manufacture, supply, delivery and installation of the pre-finished pre-cast concrete panels with granite slabs affixed thereon, for the said project. The main contractor of the project was one Teknik Cekap Sdn Bhd ('Teknik'), and by its letter dated 26 August 1991, Teknik confirmed the plaintiff's appointment. Subsequently, a sub-contract between Teknik and the plaintiff was executed only on 30 May 1992, although actual work had commenced in October 1991.

On 25 June 1992, the plaintiff wrote to the defendant to revise the earlier sub-contract. After much discussion, a revised sub-contract was signed by the plaintiff and the defendant on 10 July 1992 ('the lump sum agreement'). It was in the form of a letter from the defendant to the plaintiff and the five main terms of the said lump sum agreement were stated thus:

1 Our agreement with you on the conversion of your existing contract to lump sum priced contract shall be subject to the terms and conditions of the main contract.

2 The all in lump sum price shall now become RM3.5m for and inclusive of all your handset works for external granite cladding and pre-finished pre-cast concrete panels and with and inclusive of all necessary materials, fixing, sealants, specifications, performance and qualities as spelt out in the current and existing signed sub-contract and also all the other works, equipments, machines necessarily connected, associated and incidental for your timely and expeditious completion of your works.

3 We shall pay you a lump sum bonus of RM250,000 if you complete the installation works of the pre-cast panels up to and inclusive of level 31 on or before 31 August 1992.

4 You agreed and confirmed in the event of your failure to complete the installation of the PC panels up to and inclusive of level 31 on or before 31 August 1992, that we shall impose a penalty of RM10,000 per day and you shall allow us to deduct the said sum/s from the progress payments or any money that may be due or to become due to you.

A 5 You agreed and confirmed that you shall complete your works from and above level 31 up to top of building on and before 30 September 1992. In the event of your failure to complete your works from and above level 31 up to top of building, we shall impose a penalty of RM10,000 per day and you shall allow us to deduct the said sum/s from the progress payments or any money that may be due or to become due to you.

B *The plaintiff's claim*

The plaintiff contends that it had, by 31 August 1992, completed the installation works up to level 31 and was therefore entitled to the bonus amounting to RM250,000.

C *The defendant's case*

The defendant contends that the works were only completed on 1 September 1992, thus disentitling the plaintiff from the bonus and rendering the plaintiff liable to a day's penalty of RM10,000 pursuant to D cl 4 of the lump sum contract. The rest of the defendant's counterclaim were as follows:

(b)	Late completion of works. Second stage (inter alia) pre-cast panel installation above level 31 and hand-set granite works delay of 171 days (30 September 1992 to 20 March 1993)	RM 1,710,000.00
(c)	Wastage on granite supplied	RM 124,697.70
(d)	Replacement of defective sealant works as of 1 April 1996	RM 115,000.00
(e)	Replacement of defective pre-cast concrete panels	RM 55,764.00
	Amount due and owing to defendant	RM 2,005,461.70

E F G

The total sum claimed inclusive of the one day's penalty of RM10,000, was therefore, RM2,015,461.70.

H *The bonus issue*

The issue as to whether the plaintiff actually completed the installation of the pre-cast panels to level 31 by midnight of 31 August 1992 is a matter of a factual finding by the court.

PW1, John Fung Ju Ning, a director of the plaintiff, testified that he was I at the site and had completed the works up to the 31st floor around 10 pm on 31 August 1992. He confirmed that the architect's clerk of works only turned up early the next morning. I do not think I can attribute any fault to

the architect who had, from the outset, disassociated himself from the bonus issue, which was solely a matter between the plaintiff and the defendant. Since the defendant was a party to the lump sum contract, I would have thought it an act of prudence for the defendant to have had its representative at the site at least up to midnight of 31 August 1992 to keep a check as to whether the plaintiff had in fact completed the works by that time, because a sum of RM250,000 as bonus was involved. However, PW1 testified that he did not see the defendant's representative at the site. The very next day, that is, on 1 September 1992, the plaintiff issued an invoice No 1030/92 demanding the sum of RM250,000. Subsequently the plaintiff sent at least five recorded reminders (see 1CABD 29, 30, 32, 33 and 34) and received no response. In fact, I find that the defendant had made no timely and pointed denial of this aspect of the plaintiff's claim. Even when the project architect sent out his progress report for period ending 13 September 1992, wherein he had made clear reference to the work being completed to level 31 on 31 August 1992, the defendant did not protest nor question the architect as to how he had ascertained that the work up to level 31 had been completed by 31 August 1992.

In fact, Teknik wrote to the plaintiff on 19 October 1992, complaining of the plaintiff's slow progress. However, in that said letter, Teknik had acknowledged the fact that works up to level 31 had been completed by 31 August 1992. This letter was copied to the defendant. Yet again there was no protest from the defendant.

The defendant contended that the plaintiff is not entitled to this bonus because 18 panels up to level 31 had not been installed. PW1 testified that these panels were in fact situated at the passenger hoist and refuse chute areas. Further, it is obvious that the plaintiff was excused by the architect from installing these 18 panels. This was clearly reflected in the architect's progress report dated 2 September 1992.

Further, DW1, Yoong Siew Chuen, the principal partner of the firm of architects responsible for the project, and who was called as a defence witness, testified that at about 9 am on 1 September 1992, when he inspected the project together with the plaintiff's representative, he found that the panels were installed and completed up to level 31. In fact, to a direct question, DW1 agreed that he was satisfied that the installation of the panels up to level 31 was completed by 31 August 1992.

Is the lump sum contract a collateral contract?

The defendant argued that the lump sum agreement dated 10 July 1992 between the plaintiff and the defendant is a collateral contract to the sub-contract with cll 3, 4 and 5 as reproduced earlier, forming the core of this new contract between the parties. Clause 1 of the said lump sum agreement states that the said conversion of the earlier agreement into this lump sum agreement 'shall be subject to the terms and conditions of the main contract'. The defendant then argued that as the plaintiff in this case is a nominated sub-contractor, only those clauses in the main contract which

A relate to matters concerning sub-contractors can be incorporated into the lump sum agreement between the plaintiff and the defendant. In the circumstances, the defendant argued that since pertinent and relevant clauses of the main contract had not been incorporated into the lump sum agreement, the latter could not be relied upon to form the basis of a claim.

B I do not agree. I find that the plaintiff is entitled to base its claim on this lump sum agreement, willingly entered into by both the plaintiff and the defendant. The statement of claim makes specific reference to this lump sum agreement. What is further evident is that by its defence and counterclaim, the defendant admits to the lump sum agreement but puts in issue the question as to whether the works were completed by 31 August C 1992. The entire evidence led by both parties was premised on the issue as to whether the works were completed by 31 August 1992 so as to determine the plaintiff's entitlement to the bonus of RM250,000 under the terms of the lump sum agreement. In fact, the whole of the counterclaim was premised on claims based on late completion as stated in the lump sum agreement. To my mind, this is a clear case of the defendant approbating D and reprobating. I reject the defence contention that the lump sum agreement amounts to a collateral contract. There is no evidence to support such a stand. Besides this was never even pleaded.

Having reviewed all the evidence, I am satisfied that the installation of the panels up to level 31 was indeed completed by 31 August 1992. In E respect of the 17 panels, clearly they were exempted from being installed by the architect.

In the circumstances, I enter judgment for the plaintiff for the bonus sum of RM250,000 with interest at the rate of 6% from 1 September 1992, to date of judgment and costs. I reject the claim for damages for breach of F contract. The purpose of awarding damages is to compensate; not to punish. The award of RM250,000 as bonus with the interest is sufficient compensation for the plaintiff without the need to consider if there were any damages at all for the breach of the contract. In any case, no evidence at all was led to show if there was any damage suffered by the plaintiff.

G *The counterclaim*

(a) The delay for one day, that is, 1 September 1992

Since I have held that the plaintiff had indeed completed the installation of H the panels up to level 31 by 31 August 1992, this claim for one day is therefore dismissed.

(b) The delay of 171 days

This period of delay is in respect of installing panels above level 31 for 171 I days to be calculated from 30 September 1992 to 20 March 1993. The loss and expense is calculated at RM10,000 per day and this appears to be based on cll 4 and 5 of the lump sum agreement.

Reason for the delay

The plaintiff agrees that it only completed this stage on 20 March 1993. However, the plaintiff's case is that this late completion was occasioned by the neglect of the defendant itself in failing to secure sufficient and timely supply of granite to the plaintiff in order for the plaintiff to make the pre-cast granite panels. The defendant argued that the plaintiff was responsible for the supply and delivery of the granite required for its pre-cast granite panels. The defendant relied heavily on the first agreement dated 30 May 1992 between Teknik and the plaintiff, wherein the first recital described the sub-contract works as 'design, supply, delivery and installation of pre-cast concrete panels pre-finished with granite slabs'. Based on this, the defendant argued that it was the duty of the plaintiff to have sourced the supply of granite in sufficient amount to thwart any delay. I reject this argument. To my mind, the first recital to the agreement indicates that the supply by the plaintiff was only limited to completed panels and slabs and not to the supply of raw granite. This view is all the more realistic seeing that there was at all times a separate granite supplier, namely, Tan Chiang Brothers. In fact, 1CABD 41, which is an agreed and admitted letter dated 28 March 1991, clearly shows that the defendant was dealing directly with Tan Chiang Brothers for the supply of granite by agreeing that Tan Chiang Brothers was their nominated supplier for the said project, by agreeing to the price and quantity and quality of the granite slabs and to all other related terms. Tan Chiang Brothers, by their reply letter dated 17 April 1991 (see 1CABD 45-46), accepted the terms with minor variations. In any case under cross-examination, even the architect who was the defendant's witness was unsure if it was the plaintiff who was the supplier. However, in his letter dated 4 January 1996, addressed to the defendant, the said architect has categorically stated that the delay in the supply of the granite was due to the supplier, namely, Tan Chiang Brothers, who were appointed by the defendant. In the circumstances, I find that in the light of the letter appointing Tan Chiang Brothers as the supplier, the least the defendant could have done was to call a representative from Tan Chiang Brothers as a witness to deny that they were the appointed suppliers by the defendant. I also find that the evidence unequivocally points to the supplier being under the control of the defendant and that the plaintiff cannot be held responsible for the delay caused by Tan Chiang Brothers. The numerous letters from the plaintiff, addressed to the architect, to the defendant and to Teknik referring to the delay by Tan Chiang Brothers bear silent but vocal testimony exculpating the plaintiff of any delay. In the circumstances, this item of claim based on delay is rejected.

There is a further point to consider. In *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, the Federal Court held that even though a sum has been agreed to as liquidated damages, a party is entitled only to so much of the damages as it is able to prove. In the case before me, other than merely relying upon the penalty clause, the defendant had led no evidence to prove the claim of RM10,000 a day or any part thereof. In the circumstances I am compelled to dismiss this claim of RM10,000 for 171 days amounting to RM1,710,000.

(c) Claim for wastage

The defendant had quantified this claim for wastage of granite at RM124,697.70. I am at loss as to how the defendant is able to make this claim as against the plaintiff unless he can fall on negligence. I find no contractual basis to enable the defendant to launch this claim. The defendant arrived at this sum by calculating the difference between the granite that was delivered by the supplier, Tan Chiang Brothers, to the plaintiff and the amount of granite that was estimated as used, by the quantity surveyor. This was the evidence of DW2, one Raymond Lum Kar Lee, who was then the project quantity surveyor for the defendant in respect of the said project. However, no evidence was led as to whether there was a wastage as such, and if so, how the wastage had occurred. Further, merely by subtracting from the amount supplied, the amount used, and alleging that any difference unaccounted for must be attributable to wastage, is stretching the line of proof so fine as to become invisible. In the absence of any strict proof of wastage, I decline to entertain this claim.

(d) Replacement of defective sealant works

With regard to this claim for RM115,000 said to have been incurred for defective sealant works, the only evidence produced was the works purportedly carried out by one Heng Multi Sealer Enterprise for a total amount of RM88,204.61. At best, therefore, this claim must be limited to RM88,204.61 and not RM115,000. In support of this claim, the defendant exhibited at 3CABD 212, the particulars and cost of the rectification works done. However, under the heading of 'Scope of Work', the works done related to 'aluminium capping' and 'internal panel joints'. Under cross-examination, DW1, the architect called by the defence, admitted that the aluminium capping and the internal panel joints were never part of the scope of works of the plaintiff. In the circumstances, any cost arising out of such rectification cannot be attributed to the plaintiff. Therefore this item of claim must also fail.

(e) Replacement of defective pre-cast concrete panels

The final claim made by the defendant amounting to RM55,764 is in respect of the cost of replacing defective pre-cast concrete panels. The only evidence led in respect of this claim was through DW2, the then project quantity surveyor of the defendant. In a brief statement, he said that the said figure was arrived at from an estimation of the cost for the replacement of the plaintiff's defective pre-cast concrete panels. Whilst concluding that he was responsible for the said estimation, he led no evidence as to how he arrived at that figure. Under cross-examination, he conceded that until this claim was referred to in the defendant's solicitors' letter of demand dated 6 October 1995, the defendant had made no previous claims upon the plaintiff in respect of any defective pre-cast concrete panels.

There is no doubt that this claim was meant as a padding. If indeed the defendant had incurred such expenses: (a) it would have a list denoting the work specifications relating to the replacements, and (b) it would have made demands long before the solicitors' notice of demand. In any case, in the absence of proof of actual expenses and since the sum claimed was a mere estimation, I reject this claim.

In all the circumstances, the defendant's counterclaim has no merits and is dismissed in its entirety with costs.

Plaintiff's claim allowed. Defendant's counterclaim dismissed.

Reported by Jafisah Jaafar